IN THE SUPREME COURT OF MISSOURI

No. S.C. 85115

WILLIAM GOMEZ
Respondent-Appellant,

vs.

CONSTRUCTION DESIGN, INC.
Appellant-Respondent

Appeal from the Circuit Court of Jackson County, Missouri
Division 3/SJ
Hon. Lee E. Wells

SUBSTITUTE REPLY BRIEF FOR CROSS APPELLANT GOMEZ

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REPLY ARGUMENTS IN SUPPORT OF CROSS-APPEAL ALLEGING AS ERROR THE REMITTITUR ORDERED BY THE TRIAL COURT

I. THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR REMITTITUR OF COMPENSATORY DAMAGES BECAUSE THE JUDGMENT OF $3,760,000.00 IS NOT GROSSLY EXCESSIVE, DOES NOT SHOCK THE CONSCIENCE OF THE COURT, NOR DOES IT DEMONSTRATE BIAS, PASSION AND PREJUDICE ON THE PART OF THE JURY AND REPRESENTS FAIR AND REASONABLE COMPENSATION FOR PLAINTIFF'S INJURIES IN THAT THE RESULTING COMPENSATORY AWARD IS SUPPORTED BY THE EVIDENCE AND IS IN RELATION TO THE DAMAGES PROVEN AT TRIAL.

A. REMITTITUR WAS NOT WARRANTED IN THAT THE JURY'S VERDICT WAS REASONABLE IN CONSIDERATION OF THE FACTORS IN THIS CASE.

The primary thrust of CDI's argument in opposition to Gomez's first point is to posit that unless the jury believed only CDI's evidence, it was not reasonable, and that since the jury instead believed Gomez's evidence the jury was unreasonable, swayed by passion and irrational. CDI ignores the fact that Gomez submitted substantial and often undisputed evidence of significant injuries suffered by Gomez as a result of the negligence of CDI. While significant trial time was spent on Gomez's brain injury, the multiple broken bones, nerve damage, joint

damage and other significant injuries were undisputed in the evidence. While it is true that CDI at trial attempted to contradict some of Gomez's evidence regarding the extent of brain injury and the ability to return to meaningful employment, the jury chose to believe Gomez's witnesses. The jury reviewed the significant testimony from multiple medical providers, experts, plaintiff himself, and family members and co-workers, as set forth in Gomez's Substitute Brief and the record on appeal, and entered a reasonable and considered verdict supported by the evidence presented at trial. That evidence, particularly when viewed in the light most favorable to plaintiff as it must be at this stage, overwhelmingly supports the jury's verdict. Gomez contends that the Trial Court erred in remitting that verdict and that this Court would err should it further disturb the award or fail to reinstate the verdict of the jury.

CDI states in its Substitute Respondent/Reply Brief that Gomez, by arguing that the trial court erred in granting remittitur, conceded that the verdict was excessive. (p. 27) This, of course, is no more correct than to state that CDI has conceded that the remitted verdict is not excessive, by defending that remittitur. CDI in its Substitute Respondent/Reply Brief also suggests that the verdict was "twenty times" greater than "any amount that could be inferred from the evidence as economic and non-economic loss" and that the remitted sum was "sixteen times" greater. (p.30) This is not correct. Gomez submitted evidence of past medical costs, future medical costs, current wages at the time of Gomez's accident, a past history of wages and the potential for future earnings which the Trial Court noted in oral argument was in excess of $534,000, plus the future medical costs. (Tr. 508). Thus, the jury verdict was less than seven times (and the remitted verdict less than five times) the actual losses and this was

without consideration of the severity of the injuries. CDI in its Substitute Respondent/Reply Brief chastises Gomez for not including a comparative case with an award of damages. However, the problem is that very few individuals have suffered the extensive damage Gomez has and lived through it. As the Trial Court noted, the injury list must be considered including the evidence of brain damage, fracture of the zygomatic arch, the orbit and other facial bones, requiring surgery, broken jaw, temporal mandibular joint damage, a broken left arm with fixation hardware at the wrist, carpel tunnel syndrome requiring surgery, damage to the cervical disc, herniated disc at the L5-S1 level, stuttering, difficulty speaking, mental and emotional impairment, the need for assistance in his daily care such as food preparation, maintaining the house and his living environment, personality changes, diminished learning capacity, memory problems, and a probable accelerated rate of aging. (Tr. 509-10.) In consideration of all of these factors, most of which CDI could not dispute in any fashion, the jury verdict is reasonable and certainly does not shock the conscience of the Court.

CDI argues in its Substitute Respondent/Reply Brief that the jury award was the result of bias and prejudice created by the videotape of the accident scene. (p. 31) The videotape of the equipment, flooring and work environment of the accident was shown to the jury once, without sound, and although the jury asked for other exhibits in the jury room, it did not ask for the tape. (L.F. 27-28.) The videotape of course is available to the Court for viewing and Gomez suggests that a review of the tape, without sound as the jury saw it, will create no bias and prejudice and is not the "poison" CDI suggests. Further, it should be noted that the videotape was never stated to represent subsequent repair, the yellow tape was not mentioned,

and an equally logical conclusion is that the yellow caution tape was placed merely to cordon off the area where a worker was injured until an investigation was completed. The tape was admitted for the legitimate reason of allowing the jury to understand the industrial environment in which the accident occurred and see for themselves the area in which the workers were performing their duties at the time of the accident.

B. VERDICT SHOULD BE REINSTATED

Based upon a review of all of the evidence presented at trial and viewing that evidence in the light most favorable to plaintiff, the verdict of the jury in the sum of $3,760,000 was not excessive and was fully supported by the evidence of medical costs (past and future), lost wages (past and future), and multiple intangible losses related to the pain and suffering of Mr. Gomez due to his injuries including brain damage; fractures of the zygomatic arch, the orbit and other facial bones, requiring surgery; broken jaw; temporal mandibular joint damage; a broken left arm with fixation hardware at the wrist; carpel tunnel syndrome requiring surgery; damage to a cervical disc; herniated disc at the L5-S1 level; stuttering and difficulty speaking; mental and emotional impairment; the need for assistance in his daily care such as food preparation and maintaining the house and his living environment; personality changes; diminished learning capacity; memory problems; and a probable accelerated rate of aging. Gomez contends that it would be appropriate for this Court to reverse the decision of the Trial Court in granting remittitur to CDI and reinstate the verdict of the jury in the amount of $3,760,000.00.

II. THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR REMITTITUR BECAUSE REMITTITUR IS A FORM OF EQUITABLE RELIEF AND EQUITABLE RELIEF IS NOT AVAILABLE IN THAT CDI HAS COMMITTED FRAUD AND HAS DECEIVED PLAINTIFF AND THE COURT BY NOT DISCLOSING, IN CDI'S RESPONSE TO INTERROGATORIES, AN ADDITIONAL TWO MILLION DOLLARS IN INSURANCE COVERAGE UNTIL AFTER JUDGMENT WAS ISSUED IN THIS CASE.

A. REMITTITUR WAS OBTAINED WITH UNCLEAN HANDS

The gravamen of CDI's argument in opposition to Gomez's point two is that there is no recourse for a plaintiff who discovers fraud after trial, verdict and remittitur. CDI's arguments attempt to create a loophole and place itself within the loophole of its own creation. CDI argues that fraud (and the documents proving the fraud) may not be considered where that fraud is discovered at the late stage of CDI's actions in this matter – when CDI disclosed an additional two million dollars in insurance coverage at the time it filed its appeal. This might be true and Gomez might be left without recourse, but for the fact that CDI sought before the Trial Court and before this Court a remedy in equity. **Equity requires clean hands throughout the entire proceedings.**

On June 6, 2001, after the trial, verdict, and remittitur of the verdict to $2,376,000, and further settlement negotiations, CDI executed a supplemental response to the Interrogatories which for the first time disclosed an additional two million dollars in insurance coverage. On

June 7, 2001, CDI filed its appeal bond for 3 million dollars. CDI through those actions does not have clean hands and Gomez suggests that this Court is entitled to consider that conduct when addressing issues of equity.

In addition, it seems unjust that CDI should be able to argue in its own appeal efforts for the correction of what it deems to be "plain error" even though the matter was not raised until the case was before the Supreme Court and yet argue against the cross-appeal that information which was not known at the trial court level should not be considered. Equity would seem to call for Gomez to be able to present his documents and make his argument against the relief granted CDI by the Trial Court without full information.

A party who participates in inequitable activity regarding the very issue for which it seeks relief will be barred by its own misconduct from receiving relief. *Guzzardo v. City Group, Inc.*, 910 S.W.2d 314, 317 (Mo.App. 1995). The inequitable activity does not need to be fraudulent in order for the party to be denied relief. *Moore v. Carter*, 201 S.W.2d 923, 929 (Mo. 1947). Rather, a lack of good faith in bringing the suit is sufficient to deny the party equitable relief. What is material is not that the plaintiff's hands are dirty, but that it dirties them in acquiring the right it now asserts. *Karpierz v. Easley*, 68 S.W.3d 565, 572 (Mo. App. WD 2002); *City of Kansas City v. New York-Kansas Bldg.*, 96 S.W.3d 846 (Mo. App. WD 2002).

CDI, having created the loophole by acting at the moment the trial court lost jurisdiction over the case, is in the enviable position of arguing there is no proof *in the trial court record* of its misdeeds. Yet, Missouri courts require that a litigant coming into equity

must keep his hands clean throughout the litigation, even to the time of ultimate disposition by an appellate court. 30A C.J.S. Equity, § 106 (1992); *Colbert v. Nichols*, 935 S.W.2d 730, 733 (Mo.App. 1996). For these rulings to have meaning in light of the fact that there is no separate cause of action for violation of Rule 61, then CDI's actions must be considered unclean hands which bar equitable relief.

CDI creates its loophole in its Substitute Respondent/Reply Brief and then proceeds to categorize Gomez's revelation of CDI's fraud as "duplicitous,""deplorable," "outrageous," "inappropriate," "unprofessional," and "contravening all logic." However, amongst all of these protestations, it should be noted that no other explanation was provided. CDI does not and can not deny the simple fact that it failed to disclose two million dollars in insurance coverage from the same company until the day before it filed its appeal bond. CDI does not even deny that the actions took place or that there is no proof, but merely states there is no proof "in the record." No justification other than fraud is set forth. Thus, fraud and unclean hands remain the only possible explanation for the conduct.

CDI claims that Gomez is attempting to "prejudice" the Supreme Court by mentioning insurance coverage or settlement negotiations. This is, of course, the reason why insurance coverage and settlement negotiations are generally inadmissible before a jury. However, in a judge-tried case or an appeal, the danger of prejudice is obviously diminished, if not eliminated. *Boling v. Boling*, 887 S.W.2d 437, 440 (Mo.App.1994). Gomez trusts that this Court will not be prejudiced by the mention of insurance coverage or settlement negotiations.

CDI places at issue the proof of the fraudulent representations submitted by Gomez in the documents attached to plaintiff Gomez's Substitute Brief. CDI argues "Gomez and his counsel were well aware both before and after trial, based upon settlement discussions, that their settlement demand and the remitted judgment were within the limitations of CDI's insurance coverage." *(Substitute Respondent/Reply Brief, page 36)* CDI does not explain how Gomez and counsel were to have known of coverage contrary to sworn interrogatory responses. The truth is that Gomez and his counsel did not know and that Gomez made his reduced demand solely based upon CDI's initial representation of insurance coverage. Gomez directs this Court's attention to the letter from Candis Young to John Graham attached to Gomez's Substitute Brief as Appendix A1sent after CDI's initial response to the interrogatory regarding insurance coverage, which states:

> "Mr. Gomez is willing to settle for the policy limits, which you have certified to be $1,000,000. Enclosed are a few "Verdicts and Settlements" reports which we offered to the mediator which may or may not have made it to your attention. **I believe these examples illustrate the fact that the offers conveyed to us were significantly less than what would be good faith in this claim, given the potential for a verdict in excess of the policy limits."** *(Emphasis added)*

The verdict was significantly larger than the disclosed one million dollar policy limit, as was the judgment even as remitted, and for CDI to argue that Gomez's settlement demand - after disclosure of insurance policy limits - was within the disclosed million dollar limit, is deceptive. If CDI means by this statement that Gomez knew of the larger insurance coverage

before the supplemental interrogatory filing, the statement is false as shown in the letter. CDI's statement is at best misleading. To say that all offers within the limit of the smaller insurance coverage which had been disclosed to Gomez were also within a larger amount of coverage which was not disclosed, is of course a true mathematics maxim. However, it is not true to state that Gomez knew the coverage was larger than that which had been stated in response to sworn interrogatories. CDI does not deny that it supplemented its interrogatory answers by adding two million dollars in coverage the day before filing its appeal bond. It cannot be said that supplementation of interrogatory answers after trial is a normal course of events. CDI does not explain why the supplementation was made or how the incomplete first response came about. Rule 61.01 states that an evasive or incomplete answer is to be treated as a failure to answer. *Wilkerson v. Prelutsky*, 943 S.W.2d 643, 647-48 (Mo. banc 1997). Gomez again suggests that CDI's actions were so deplorable as to render CDI to be of unclean hands and not worthy of equitable relief.

CDI's final argument is a form of "no harm, no foul." CDI submits that since Gomez never accepted any of CDI's settlement offers, Gomez was not prejudiced by CDI's actions in concealing limits of insurance coverage. This argument ignores the equitable principles involved and condones this type of behavior in the discovery process. Public policy should not allow such a result.

B. ORDER OF EQUITABLE REMITTITUR SHOULD BE REVERSED DUE TO UNCLEAN HANDS

Gomez contends that the misrepresentations by CDI at the Trial Court level regarding its insurance and the failure of CDI to comply with discovery through evasive and fraudulent answers to Interrogatories is sufficient justification on equitable grounds and within the rules for enforcement of discovery to warrant reversal of the Trial Court's order of remittitur and the reinstatement of the jury's verdict. Gomez requests that the Supreme Court repair the error made by the Trial Court through the Court's lack of knowledge of CDI's deceptive discovery responses. Accordingly, Cross-Appellant Gomez requests that this Court reinstate the jury's verdict as the final judgment in this matter.

CONCLUSION

For the reasons stated both in response to Appellant CDI's arguments and on Cross-Appeal, the judgment of the Circuit Court of Jackson County granting one million dollars in remittitur should be reversed and the jury verdict of $3,760,000 should be reinstated.

Alternatively, the judgment of the Circuit Court of Jackson County should be affirmed with the reduced verdict and Appellant CDI's appeal requesting a remand with directions to enter judgment for defendant or to conduct a new trial on all issues should be denied.

Respectfully submitted,

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RULE 84.06 (c) CERTIFICATION

I hereby certify in accordance with Rule 84.06(c) that this brief includes the information required by Rule 55.03, complies with the limitations contained in Rule 84.06(b) and includes 2957 words or 245 lines in its entirety.

Candis Young

CERTIFICATE OF VIRUS FREE DISK

I hereby certify that the disk filed with this Brief required by Rule 84.06(g) has been scanned for viruses and that it is virus free.

Candis Young

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing and a computer disk containing the brief was mailed, postage prepaid, this 12th day of May, 2003, to Douglas N. Ghertner, SLAGLE, BERNARD & GORMAN, P.C., 4600 Madison Avenue, Suite 600, Kansas City, Missouri, 64112-3012, (816) 410-4600, Fax: (816) 561-4498, and John M. Graham, Jr., LAW OFFICES OF STEPHANIE WARMUND, 9200 Ward Parkway, Suite 300, Kansas City, Missouri, 64114, (816) 361-7979, Fax: (816) 523-8682, Attorneys for Construction Design, Inc.

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